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Supreme Court, U.S.
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In The

Supreme Court of the United States

LIVINGSTON DOWNS RACING ASSOCIATION, INC.
Petitioner,

v.

LOUISIANA STATE RACING COMMISSION
Respondent.

On Petition For Writ Of Certiorari To the Supreme Court Of The State Of Louisiana

PETITIONER'S REPLY BRIEF

DARLENE S. RANSOME (#21983)
RANSOME LAW FIRM, L.L.C.
5353 Florida Boulevard
Baton Rouge, Louisiana 70806
(225) 928-2620
Counsel of Record for Petitioner
Livingston Downs Racing Association, Inc.
and
J. MARVIN MONTGOMERY (#8169)
P. O. Box 66124
Baton Rouge, Louisiana 70896
(225) 931-5860

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LAW AND ARGUMENT

The Louisiana State Racing Commission (hereinafter the "Commission"), through numerous misrepresentations of fact, contends that there are no grounds upon which Livingston Downs Racing Association, Inc. ("LDRA") can invoke jurisdiction under 28 U.S.C. §1257. LDRA clearly pled the federal questions of due process and equal protection beginning at the April 29, 1994 Commission meeting and in LDRA's appeals through the state district court, the state appellate court and the state supreme court. (See e.g. *Petitioner's Appendix M, pages 37m-41m, Petitioner's Appendix C, pages 10c-15c*). The Commission, however, contends that the mere fact that federal questions of due process and equal protection, clearly pled by LDRA, were not acted upon by the three state appellate courts precludes jurisdiction of this Honorable Court. To the contrary, this Honorable Court in West Virginia Board of Education v. Barnette, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) states:

> The Fourteenth Amendment as applied to States protects the citizen against the State itself, and all of its creatures--Boards of Education not excepted.

Consider the actors in this lengthy litigation. The powerful publicly-traded Fair Grounds Corporation used its influence to improperly enlist the aid of the Commission in protecting its monopoly. State Senator Larry Bankston, attorney for the Fair Grounds and chairman of the powerful "Judiciary B" legislative committee overseeing gambling matters in Louisiana, was convicted in Federal Court in 1997 of two counts of interstate communications in aid of racketeering involving the Louisiana video gaming industry. Former Governor Edwin Edwards, who appointed and controlled the members of the Commission, was recently convicted in Federal Court of 17 of 26 counts, including, but not limited to, violations of the Racketeer Influenced and Corrupt Organization ("RICO"), extortion and conspiracy,

involving the licensing of riverboat casinos. Edwards testified on behalf of the defense at Bankston's 1997 trial.

During Edwards' racketeering trial, testimony revealed that Bryan Krantz, President of the Fair Grounds, was a member of Edwards' "kitchen cabinet," a term referring to those insiders with considerable influence with the former Governor. More recently, a district court judge pled guilty to participating in a scheme with Edwards and others to "fix" an insurance settlement. While state offenses were involved, it was the United States Government rather than Louisiana's Attorney General, which indicted and convicted three consecutive insurance commissioners, a state senator and a former governor.

It is true that LDRA has been involved in significant litigation. It was necessary for LDRA to file suit to have its rights under the racing statutes defined. The Commission repeatedly refused to place LDRA on its meeting agendas for a ruling on LDRA's rights as to on-site other track simulcasting and off-track simulcasting. The license/permit granted to LDRA in December of 1992 was "only step one in a process which required [him] to apply for further licensing before he could operate a racetrack," Louisiana Fourth Circuit Court of Appeal in Docket No. 93-2235. The December, 1992 license/permit authorized a referendum election to be held which was required under state law to authorize horse racing in Livingston Parish. The granting of that license/permit was immediately attacked by the Fair Grounds in the state district court, which reversed the granting of the license/permit. That license was ultimately reinstated by the Louisiana Fourth Circuit Court of Appeal. The Commission's statement that it assisted LDRA in defense of its license in Suit No. 92-20961 (which the instant case was consolidated with on motion of the Fair Grounds' attorney) is ludicrous. The Commission took such a minute role in defending the grant of LDRA's license that had it not been for LDRA's intervention and defense in that suit, Judge Giarrusso's initial decision overturning LDRA's December

1992 license/permit would probably not have been overturned. In addition, LDRA had to defend the actual holding of the election. (LDRA's Petition, page 5). On January 16, 1993 the citizens of Livingston Parish approved the referendum. However, the results of the election were contested in state court and did not become final until the Fair Grounds' nominee agreed to dismiss the appeal on August 18, 1998, less than sixty days prior to the deadline imposed by the consent judgment for LDRA to obtain financing. LDRA has also had to fight and appeal the various attempts of the Commission to avoid completion of the licensing process and/or revoke its license.

In January of 1993 LDRA filed an application to the Commission for a ten year racing license and for approval of racing days. The Commission finally granted the ten year license and approved the racing days on May 27, 1993, only after LDRA filed a writ of mandamus. Eleven months later, on April 29, 1994 the Commission suspended and/or revoked LDRA's license despite the fact that the state courts had not ruled on the issues in litigation concerning the validity of the referendum. Between the legal attacks on LDRA's initial license/permit, the legal attacks on the results of the referendum and the Commission's suspension or revocation of LDRA's license, LDRA had no opportunity to begin construction of a race track. It is absurd for the Commission to imply that LDRA has dawdled around in regard to the building of the race track when LDRA's right to operate has been in limbo since the date it was awarded a license in 1992.

Due diligence on a loan application is a very expensive process. It is difficult to convince a lender or investor to undertake this process when the license required is in doubt. Throughout the period from 1992 to present, LDRA had only one brief period of less than sixty days in 1998 at which time its license was not under attack. During this time, LDRA obtained a commitment for financing, which the Commission's attorney arbitrarily rejected without authority and without the Commission holding a hearing to

address the issue. During this period, LDRA has expended over $1.5 million cash and incurred debt of an additional $1.6 million, all in connection with its options to purchase, renewals thereof and actual purchase of the land on March 29, 1996, pre-development costs and litigation. These amounts total over 30% of the $10 million in funds deemed acceptable by the Commission. For the Commission to allege that LDRA is not seriously pursuing the development of its racetrack is ridiculous.

The Commission, on page 6 of its opposition brief, states that it has a "continued commitment to licensing Livingston Downs when it was able to show the financial wherewithal to construct a racetrack and conduct a race meet." Yet, when LDRA did present its financial information on October 31, 1998 the Commission refused to hold a hearing on LDRA's "financial wherewithal" as required by statute and by the consent judgment. Instead the Commission's attorney unilaterally filed a motion in court to dismiss the pending lawsuit, thereby effectively revoking LDRA's license. Moreover, LDRA advised the Commission that it had a $10 million commitment to provide financing for the construction of the race track as far back as November, 1994, less than eight months after the revocation of its license. However, the Commission refused to place the item on the agenda, stating that LDRA's license revocation was in litigation. Additionally, in August 1996, the Commission attempted to fine LDRA over $200,000.00 for failing to conduct races under its license (which of course, was in litigation). This action is unprecedented in the history of Louisiana racing. Two of the other racetracks took several years from the date of the initial grant of the license by the Commission to build their facilities (Louisiana Downs 10 years from the date of its original license; the former Jefferson Downs approximately 5 years). A third association was granted a license in 1994 and has yet to even acquire the property and/or begin construction. Although under state law the license granted to this association is site specific, the

Commission has allowed this association to change its proposed location at least twice. These time frames are considerably longer than the eleven months that LDRA was afforded by the Commission before it attempted to revoke LDRA's license. LDRA has received unequal treatment by the Commission. Far from the "continued commitment to licensing LDRA," the Commission's actions against LDRA from January 1993 through the present have enabled the Fair Grounds to maintain its monopoly at the expense of LDRA's constitutional rights.

In the antitrust and civil RICO lawsuit filed by LDRA (LDRA's Petition, Appendix O), the Fair Grounds admitted in its statement of undisputed facts in support of a motion for summary judgment that, among other things, the Fair Grounds paid Larry Bankston's legal fees to file and prosecute the two suits contesting the referendum and that the Fair Grounds lobbied the Commission to institute certain actions against LDRA, two of which were the revocation of LDRA's license and fining LDRA over $200,000.00.

The facts and due process issues in the instant case closely parallel the issues before this Honorable Court in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499. Accardi was a habeas corpus action in which the petitioner attacked the validity of denial of his application for suspension of deportation on the ground that the application was prejudged through issuance by Attorney General, prior to Board's decision, of a confidential list of individuals, including the petitioner, whom the Attorney General wanted deported which made it impossible for the petitioner to secure fair consideration of his case. The United States District Court refused to allow offer of proof and entered an order denying the writ and the petitioner appealed. The United States Court of Appeal for the Second Circuit, 206 F.2d 897, entered judgment of affirmance and the petitioner obtained certiorari. The United States Supreme Court, Mr. Justice Clark, held that the allegations entitled the

petitioner to a hearing and reversed the decisions of the Court of Appeal and District Court.

The petitioner did not attack the constitutionality of the Immigration Board's rules. His allegations attacked the results obtained by the Board's actions (or inaction) in violation of its rules and his due process rights. Here, LDRA advances an identical argument. In Accardi, the Board of Immigration was appointed by the Attorney General, but the legislature granted the Board the same discretionary authority conferred by statute upon the Attorney General and denied to the Attorney General the right to side step the Board or to dictate its decisions. In the instant case, state law grants the Commission the sole authority to decide issues before it. State law requires that the Commission must act in conformity with the constitution, the racing statutes, the Administrative Procedure Act and the Open Meetings Law. The role of the Louisiana Attorney General, or his representative, is clearly limited by statute to serve as advisor to the Commission. The record is abundantly clear that before the motion to dismiss was filed, the Commission did **not** hold a hearing on the matter of LDRA's October 30, 1998 license application, **nor** did it convene to even discuss the issue of compliance with the consent judgment in this case. The Commission's counsel (an Assistant Attorney General) arbitrarily and capriciously determined that a conditional contract between two parties who considered themselves bound by its terms was unenforceable and that LDRA had not complied with the consent judgment.

In Accardi, this Court stated:

> [5][6] The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. . . . In short, as long as the regulations remain operative, the

> Attorney General denies himself the right to side step the Board and dictate its decision in any manner.
>
> This Court summarizes its review in:
>
> [8] Failure of the Board of Immigration Appeals to exercise its own discretion in determining whether application for suspension of deportation should be granted is a denial of due process.

In the instant case, throughout its long history of litigation, as well as in the Petition filed herein, LDRA cites numerous specific instances supported by the record wherein the Commission failed to follow its statutory mandates, therein violating LDRA's due process rights. In the final action prompting this appeal, there is no question that the Commission failed to act and that its attorney exceeded her authority. The Commission's counsel seeks with great emphasis to exonerate the Commission by articulating the subsequent action by the Louisiana Courts. This Honorable Court in Accardi took note that the District Court refused offers of proof and entered an order denying the writ on allegations of the petitioner without a written opinion. This is identical to the State District Court's actions in the LDRA case. This Court further noted that the Court of Appeal affirmed the ruling of the District Court. Obviously, this Court determined in Accardi that the violation of due process occurred at the administrative level and reversed both the District Court and the Court of Appeal.

The Commission, on page 5 of its opposition brief states that it gave notice to LDRA that its "eligibility to retain its license in the face of its apparent difficulty to bring a racetrack to Livingston Parish would come for hearing on April 29, 1994 in New Orleans before the Commission." The Commission did not attach this alleged certified letter and two separate subpoenas to its brief. In any event, such a notice would in no way comport with due process since the April 29, 1994 hearing was not held in New Orleans, but in Bossier City, approximately 300 miles away from New Orleans. See LDRA's Petition, Appendix M, (p. 1m).

The Commission's November 10, 1998 motion for dismissal was allegedly based on deficiencies in the loan commitment issued to Al Ransome and LDRA. The Commission admits that it did receive the license application timely. This invoked Paragraphs 7 through 10 of the consent judgment (LDRA's Petition, Appendix N, pp. 3n-4n), under which the Commission, not its attorney, was required to take action. The fact that LDRA applied for the license for its own behalf in the name of its wholly owned subsidiary, LDRA, LLC, was a minor technical point which the Commission, *in the required hearing*, had the discretion to accept.

Even if it was determined that paragraph 15 of the consent judgment was appropriate, it was a question of fact that could only be determined by the full Commission. At the very minimum, Louisiana law required that the full commission convene in open meeting after proper notice and vote to go into executive session to discuss litigation. After discussing their attorney's recommendation, the law further requires that the Commission reconvene in an open meeting and cast a recorded vote to authorize its attorney to file the motion to dismiss. The record is clear that the Commission failed to do so.

In reversing the decision of the United States District Court for the District of South Carolina which upheld the administrative order in United States v. Morgan, 193 F.3d 252, the U.S. Court of Appeal, Fourth Circuit, in a ruling issued September 21, 1999 writes at:

> [9] We have recognized that an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination. See, e.g., Delgado-Corea v. INS, 804 F.2d 261 (4th Cir. 1986). This principle is rooted in **United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)**, . . .The **Accardi** doctrine, as it has come to be known, has since been applied in a

> variety of contexts. *(citations omitted)* The fact that a particular regulation or procedure is not mandated by the Constitution or by statute is of no moment for purposes of an analysis under the **Accardi** doctrine. *(citations omitted).*

The Commission argues in its opposition brief that LDRA "has never, and still does not, challenge the factual findings first made by the trial court that the conditional commitment for collateralized mortgage financing was not an "enforceable, binding commitment" per the terms of the Consent Judgment." However, paragraph 16 of the Consent Judgment reserved that jurisdiction to the Commission. (LDRA's Petition, Appendix N, page 6n-7n). LDRA cannot challenge findings of fact that have never been made. The Commission never conducted an investigation, nor did it hold an adjudicatory hearing from which it could factually determine that the financial commitment submitted by LDRA on October 31, 1998 was not an "enforceable, binding commitment." The trial court, despite being required to hold a trial de novo, never made a factual determination that LDRA's financial commitment was not an "enforceable, binding commitment." Likewise, the Louisiana Fourth Circuit Court of Appeal did not hold that the financial commitment was not an "enforceable binding commitment." Rather the Court of Appeal, for other reasons, ruled that the financial commitment did not comply with the Consent Judgment. However, this ruling of the Court of Appeal was made without the benefit of a complete record and without the benefit of any evidence or written reasons from the trial court.

Even the Commission, on page 27 of its opposition brief, admits that particular documents necessary to the appeal were not in the record and that the record before the Fourth Circuit Court of Appeal was incomplete. Proper judicial review was impossible.

CONCLUSION

The right to conduct a legitimate business and to earn a living is a fundamental right. If a person is required to obtain a license from a state regulatory agency in order to conduct that business and to earn a living then that license becomes one of the most valuable pieces of property that a person can own. If that license is arbitrarily and capriciously revoked by the agency in a manner that blatantly disregards all procedures established to guard against such actions then that person's due process rights under the Fourteenth Amendment have been violated. That violation continues when the process of judicial review is marred by the trial court's failure to hear evidence and to provide the appellate courts with a complete record necessary to the appeal.

In Accardi, this Court did not address the merits of the arguments of either party. The Court wrote at p. 268:

> If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations required in such proceedings.

LDRA respectfully urges this Honorable Court to weigh the facts of this case in accordance with the well established Accardi doctrine and grant LDRA's petition for certiorari.

Respectfully submitted:

DARLENE S. RANSOME (#21983)
RANSOME LAW FIRM, L.L.C.
5353 Florida Boulevard
Baton Rouge, Louisiana 70806
(225) 928-2620
Counsel of Record for Petitioner
Livingston Downs Racing Association, Inc
and
J. MARVIN MONTGOMERY (#8169)
P. O. Box 66124
Baton Rouge, Louisiana 70896
(225) 931-5860